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No. 86-981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,

Petitioner,

v.

CITY OF RALEIGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADVERTISING COUNCIL INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SEYMOUR SHAINSWIT
Counsel of Record
HALL, DICKLER, LAWLER, KENT & FRIEDMAN
460 Park Avenue
New York, New York 10022
(212) 838-4600

Attorneys for Amicus Curiae

Of Counsel:
SEYMOUR SHAINSWIT
FELIX H. KENT
STEVEN E. LEVITSKY

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MOTION OF THE ADVERTISING COUNCIL INC. FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Advertising Council Inc. moves this Court for permission to file an Amicus Curiae brief in support of

petitioner. Respondent has declined to consent to the filing of this brief.

The Ad Council Inc. is a private, non-profit organization. In 1985 the Ad Council conducted several dozen public service campaigns and generated mote than $725 million worth of advertising time and space from numerous cooperating print, electronic and display media outlets.

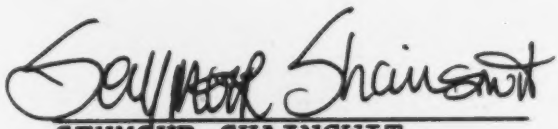
Among the media that regularly display the Ad Council's public service messages are outdoor advertising structures, such as billboards. The Ad Council is greatly concerned about the potential spread of local ordinances, such as that upheld by the court of appeals in this case, which, by eliminating substantial numbers of billboards across the country, would seriously inhibit the Council's ability

to convey its public service announcements. Because the Ad Council is a non-profit organization, we believe its interests are not adequately represented by any other party to this Petition.

For these reasons, the Ad Council respectfully requests permission to file a brief as Amicus Curiae.

January 19, 1987

Respectfully Submitted,



SEYMOUR SHAINSWIT
HALL, DICKLER, LAWLER,
KENT & FRIEDMAN
460 Park Avenue
New York, New York
(212) 838-4600
Attorneys for the
Advertising Council
Inc.

QUESTION PRESENTED

Whether a municipal ordinance requiring the uncompensated removal of hundreds of billboards used for public service and commercial advertising purposes violates the Due Process or Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

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BRIEF FOR THE ADVERTISING COUNCIL INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Advertising Council Inc. is a private, non-profit organization of thousands of volunteers who conduct public service advertising campaigns on behalf of a number of worthy civic

causes, such as efforts to combat crime, drunk driving, drug and alcohol abuse, and employment discrimination, as well as campaigns sponsored by the United Way. In 1985 the Ad Council conducted several dozen public service campaigns and generated mote than $725 million worth of advertising time and space from numerous cooperating print, electronic and display media outlets.

Among the media that regularly display the Ad Council's public service messages are outdoor advertising structures, such as billboards. For some campaigns, outdoor advertising is a uniquely effective means of spreading the Ad Council's public service message; for many other campaigns, outdoor advertising is an important part of the mix of media used because it is such a cost-efficient means of reaching a large

portion of the community. The Ad Council is greatly concerned about the potential spread of local ordinances, such as that upheld by the court of appeals in this case, which, by eliminating substantial numbers of billboards across the country, would seriously inhibit the Council's ability to convey its public service announcements.

SUMMARY OF ARGUMENT

Outdoor advertising is an important medium of expression that is entitled to protection under the First Amendment. Because outdoor advertising reaches a great number of persons at low cost, there may be no alternative, equally effective channels of communication for many groups attempting to convey their messages to large and

diverse segments of the public. While the Advertising Council is fortunate to receive generous contributions of time and space from electronic and print media, billboards are an integral part of its efforts, in Raleigh and elsewhere, to disseminate its non-commercial public service announcements.

The forced removal of billboards, even for a worthy civic purpose such as scenic improvement, thus raises substantial First Amendment concerns. As a result, it is incumbent upon the courts to ensure that regulations restricting outdoor advertising scrupulously comply with all applicable constitutional requirements. We believe that the Petition convincingly demonstrates that Raleigh's ordinance violates the Fifth Amendment by mandating the destruction of valuable

existing properties without the payment of just compensation.

Although the Fifth Amendment would not prevent Raleigh from eliminating Naegele's billboards, and diminishing the Ad Council's means of expression in the city, so long as it offers just compensation, the facts of this case show that Raleigh would be unlikely to do so if it were put to that choice. By eliminating the need to pay just compensation, however, the court of appeals has relieved Raleigh of the constitutionally-imposed obligation to weigh costs and benefits before taking private property for a public purpose. This ruling thus will encourage other municipalities to order the removal of billboards, to the great detriment of civic and business organizations that depend on outdoor advertising to convey

their messages.

ARGUMENT

OUTDOOR ADVERTISING IS AN IMPORTANT MEDIUM OF COMMUNICATION THAT SHOULD NOT BE ELIMINATED ABSENT STRICT ADHERENCE TO CONSTITUTIONAL REQUIREMENTS

1. This Court stated in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion), that "[b]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." See also id. at 524 (Brennan, J., concurring in the judgment) ("[t]he plurality and I agree that billboards are a medium of communication warranting First Amendment protection."). The Court also remarked in Metromedia that billboards are a "unique forum[] of expression" (id. at 500) and that

"[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Id. at 516 (quoting the parties' Joint Stipulation of Facts No. 28).[1]

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1 See Meiselman, The Regulation of Outdoor Advertising: Balancing Freedom of Speech and Aesthetics, 1985 Annual Survey of American Law 671, 672 (footnotes omitted):

> Billboard regulations that further aesthetic objectives may threaten first amendment interests. Although regulation of the medium itself is constitutionally permissible, the billboard messages remain constitutionally protected speech. The first amendment protects the right to advocate a chosen cause using the most effective means possible, and, if a billboard is the only effective method of communication for a particular message, the elimination of the billboard as a potential medium for that message may infringe on that right. Additionally, the first amendment requires that speech regulation be applied in a nondiscriminatory manner Thus, if a regulation

The experience of The Advertising Council Inc. confirms this Court's observations. Established in 1942, the Ad Council is a private, non-profit organization that conducts public service advertising campaigns designed to increase public awareness of, and thereby to help solve, societal problems. Among the several dozen current campaigns, for example, are "Aid to Higher Education," "Youth Alcoholism Prevention," "United Negro College Fund," "Drunk Driving Prevention," "Forest Fire Prevention," "Help Fight Pollution," and "Participation of Disabled Citizens." See The Advertising Council Inc. 1985-1986 Annual Report 4-

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eliminates the use of relatively inexpensive billboard messages and precludes groups with limited resources from communicating effectively, the regulation may infringe on first amendment freedoms.

19. The Ad Council accomplishes these goals by placing advertisements in media outlets across the country. In 1985, the Ad Council generated more than $725 million worth of advertising time and space from thousands of print, broadcast, and display media outlets. Id. at 22.

For several reasons, outdoor advertising is an essential component of these campaigns. First, as the Court noted in Metromedia, billboards are an extremely inexpensive and cost effective method of conveying a message to large and diverse segments of the community. In addition, billboards offer a form of communication for which there often is no adequate substitute in terms of effectiveness. Take the Ad Council's campaign, begun in 1985, to encourage seatbelt use among drivers. This

campaign focuses heavily upon radio and outdoor advertising, because the message -- "Buckle Your Safety Belt" -- is far more likely to make a lasting impression on people when they are in their automobiles.[2] In sum, as the Ad Council's Vice President has testified, "outdoor advertising is as essential as the test of the communications media in promoting voluntary citizen actions to solve national problems." Testimony of Lewis W. Shollenberger before the Federal Highway Administration, July 10, 1979.

The outdoor advertising indus-

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[2] A Department of Transportation survey in 19 cities, conducted in the first six months of 1986, found that safety belt use by drivers increased from 23% to 34.2% during the period of the Ad Council campaign. See 1985-1986 Annual Report 5. Billboards also play a vital role in the Ad Council's campaign against drunk driving. It is therefore ironic that Raleigh would defend its billboard removal ordinance on the ground of traffic safety. See Pet. App. 20a.

try, including petitioner Naegele, annually donates thousands of billboards, worth many millions of dollars, to promote Ad Council campaigns. In 1985, for example, outdoor companies gave space to display 38,240 signs or messages in support of Ad Council programs. See 1985-1986 Annual Report 23. Petitioner itself obtained nearly 1,500 signs from the Ad Council for display in North Carolina, including 320 for Raleigh.

2. This brief discussion highlights an essential point that the district court and the court of appeals appear to have overlooked: billboards and other forms of outdoor advertising cannot be equated with gravel pits, brickyards, livery stables, or other perceived public "nuisances" that can be eliminated by legislation or moved

elsewhere at no loss to the community. Rather, as the Petition states (Pet. 17 n.9), "[f]ar from posing a threat to the public health, safety, or morals, outdoor advertising serves as an important medium of public expression clothed with protections under the First Amendment." Assuming arguendo, therefore, that billboards create aesthetic problems that warrant some legislative restrictions in the public interest, such restrictions at the same time inhibit the expression and dissemination of valuable information, contrary to the public interest.[3] With the spread of ordinances like Raleigh's

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[3] In contrast to the very real First Amendment rights at stake, aesthetic concerns are, of course, necessarily subjective. See, e.g., The Washington Post, October 8, 1986, p. 43, reporting the results of a nationwide poll showing that 70% of those surveyed stated that billboards were not annoying or unatractive.

requiring that billboards be taken down, organizations such as the Ad Council would find it increasingly difficult to convey their public service messages in an efficient and effective manner.

In light of these concerns, it is essential that the courts ensure that local governments adhere scrupulously to constitutional requirements before ordering the elimination of an important means of communication. In Metromedia, this Court invalidated a San Diego billboard ordinance because it accomplished its purposes in a manner that violated the First Amendment. Here, the Raleigh billboard ordinance requires the removal of a substantial portion of the available outdoor advertising in the city in a manner that runs afoul of the Fifth Amendment. As the Petition explains, Raleigh has

ordered Naegele to tear down 174 billboards -- nearly 40% of the total number of billboards in the city -- without the payment of any compensation for these properties.[4]

The Ad Council fully appreciates that -- putting aside First Amendment issues not presented by the Petition -- Raleigh could

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[4] Although the Raleigh ordinance purports to allow 150 square foot billboards alongside four-lane roads and 75 square foot billboards alongside two-lane roads, these sizes are too small for effective communication with persons in passing automobiles. Perhaps more important, these sizes are far smaller than the standardized poster panels manufactured and distributed for use in outdoor advertising nationwide. See Meiselman, 1985 Annual Survey of American Law at 688 & n.119. It would greatly increase expenses if the Advertising Council had to produce posters in "oddball size[s]" for the Raleigh market (see Donrey Communications Co. v. City of Fayetteville, 280 Ark. 408, 660 S.W.2d 900, 90x (1983), cert. denied, 466 U.S. 959 (1984)); most likely, the Ad Council would simply forgo outdoor advertising in Raleigh.

constitutionally eliminate Naegele's billboards, and thus irreparably damage the Council's expressive interests in the city, simply by offering just compensation for the billboards and accompanying leaseholds. See Berman v. Parker, 348 U.S. 26, 36 (1984) (city has authority to condemn private property for aesthetic purposes, and the "rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."). But that, at least, would put municipalities to the difficult choice of leaving these First Amendment facilities intact or paying for their destruction. As this case plainly demonstrates, many localities (including Raleigh), if given that choice, would not demand that outdoor advertising structures be taken down.[5]

By making the taking cost-free, however, the court of appeals' ruling instead tips the scales heavily in favor of necessarily subjective aesthetic considerations and against First Amendment considerations and thus substantially skews local governments' decision-making processes.

As a result, the decision below removes the constitutionally-mandated disincentive to the taking of private property and encourages

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[5] As the Petition explains (Pet. 5 n.2), North Carolina law provides that localities must pay just compensation for the forced removal of outdoor advertising signs alongside federally aided highways. In view of this state-imposed requirement, Raleigh chose to live with the alleged aesthetic and traffic safety problems caused by Naegele's 170 billboards adjacent to federally-aided highways rather than compensate Naegele for their removal. See Pet. App. 32a ("[a]ll conforming outdoor advertising signs shall be discontinued or made conforming * * * unless explicitly prohibited by state statute.").

municipalities to order widescale removal of outdoor advertising. The impact of such removals will fall heavily on the Ad Council and other civic, political, and business organizations that depend on billboards to convey their messages. This disturbing development, which threatens First as well as Fifth Amendment values, raises important issues that warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SEYMOUR SHAINSWIT
Counsel of Record
HALL, DICKLER, LAWLER
KENT & FRIEDMAN
460 Park Avenue
New York, New York 10022
(212) 838-4600

Attorneys for Amicus Curiae

OF COUNSEL:

FELIX H. KENT
STEVEN E. LEVITSKY

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